Supreme Court
FILED
AUG 25 1992
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92-434

No. _____

In The

Supreme Court of the United States

October Term, 1992

HUDSON INSURANCE COMPANY,
a Delaware corporation,

Petitioner,

v.

AMERICAN ELECTRIC CORP., a Florida corporation, AMERICAN ENVIRONMENTAL PROTECTION CORP., a Florida corporation, AMELCO INVESTMENT CORP., a Florida corporation, EASTERN ELECTRIC CORP., INC., a Florida corporation, DON L. TULLIS AND ASSOCIATES, INC., a Florida corporation, and GREEN RIVER STEEL CORP., a Delaware corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I.

Whether the right of the EPA – or of a polluter – to obtain reimbursement of CERCLA cleanup cost from an insurance company is governed by 50 different standards, as the lower court held, or by a uniform federal rule nationally standardizing the role of insurers in Superfund proceedings.

II.

Whether the federal courts have jurisdiction to decide the applicability of insurance policies in CERCLA cleanup actions.

III.

Whether the standard Comprehensive General Liability insurance policy provides coverage for liabilities imposed by CERCLA.

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JURISDICTION

This is a petition for review of a decision issued by the United States Court of Appeals for the Eleventh Circuit on April 3, 1992. An order denying petition for rehearing and suggestion for rehearing en banc was entered by the court on May 28, 1992. The Supreme Court of the United States has discretionary jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1)(1988). This petition is timely filed pursuant to 28 U.S.C. § 2101(c), and Supreme Court Rule 13.4, within 90 days after the denial of the petition for rehearing.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331

42 U.S.C. §§ 9601(13), 9607(e), 9608, 9609, 9613(b) and 9613(f)

The text of these is set out in Appendix C.

STATEMENT OF THE CASE

On August 9, 1989, the Environmental Protection Agency (EPA) sent a demand letter to Green River, Defendant/Appellee below, requesting reimbursement for

CERCLA clean-up costs incurred in cleaning up a Superfund site contaminated by polychlorinated biphenyl (PCB) (Appendix A). Green River then demanded that Hudson Insurance Company, Plaintiff below, pay for these costs under an excess Comprehensive General Liability ("CGL") policy issued by Hudson to American Electric Corporation, a bankrupt (Appendix B). Hudson filed a declaratory judgment action in the United States District Court alleging jurisdiction under 28 U.S.C. § 1331 and CERCLA, 42 U.S.C. § 9613(b). Hudson sought a declaration that the question of its liability for CERCLA Superfund costs was controlled by federal law, and that under federal law, it had no liability for CERCLA Superfund costs.

The District Court granted Green River's motion for judgment on the pleadings, dismissing the case for lack of subject matter jurisdiction. *Hudson Ins. Co. v. American Elec. Corp.*, 748 F. Supp. 837 (M.D. Fla. 1990). Hudson timely appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the dismissal with a written opinion, *Hudson Ins. Co. v. American Elec. Corp.*, 957 F.2d 826 (11th Cir. 1992). Rehearing and rehearing en banc was denied without opinion on May 28, 1992.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court had jurisdiction to hear this declaratory judgment action under 28 U.S.C. § 1331 because the underlying liability arises under federal law, specifically CERCLA; and because the question

of insurance coverage for CERCLA liabilities is so completely preempted by CERCLA that the question falls within the "arising under" jurisdiction described in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) and *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

Petitioner also suggests that the instant *controversy* arises directly from CERCLA itself: no CERCLA, no controversy. The federal courts have jurisdiction over "all controversies arising under [CERCLA]," 42 U.S.C. § 9613(b), including this one. *See* 132 Cong. Rec. S14895-02 (daily ed. Oct. 13, 1986) (remarks of Sen. Dole) (CERCLA controversy to be heard in federal court even if it arises under state law; interpreting conference report to SARA); 132 Cong. Rec. H9561-03 (daily ed. Oct. 8, 1986) (remarks of Rep. Lent) (same).

REASONS FOR GRANTING THE WRIT

If the EPA brought a direct action for CERCLA costs (42 U.S.C. § 9607) against an insurer (42 U.S.C. § 9608(c)) in California, it would get one result,[1] but if the same action were brought against the same insurer using the same policy form in Colorado, the opposite result would follow.[2] Thus, on the ultimate question of whether the standard insurance policy provides coverage for CERCLA

[1] *E.g., Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551 (9th Cir. 1991).

[2] *E.g., Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, 954 F.2d 601 (10th Cir. 1992).

liabilities, the circuits are in conflict.[3] Supreme Court Rule 10.1(a). The threshold issue – whether the ultimate issue is a federal question – was decided below in a way that conflicts with applicable decisions of this Court *and* is an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10.1(c). This petition seeks to have the Court correct the pervasive misconception that coverage for CERCLA liabilities is a matter to be decided under the various states' laws.[4]

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[3] *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989) (coverage); *New Castle County v. Hartford Accident & Indem. Co.*, No. 91-3857, 1992 WL 174419 (3d Cir. July 28, 1992) (no coverage); *CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 77 (1st Cir. 1992) (coverage); *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153 (4th Cir. 1992) (no coverage); *Independent Petrochemical Corp. v. Aetna*, 944 F.2d 940 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1777 (1992) (coverage); *FL Aerospace v. Aetna Casualty & Sur. Co.* 897 F.2d 214 (6th Cir. 1990) (no coverage); *Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, No. 91-2254, 1992 WL 150933 (8th Cir. Jul. 6, 1992) (no coverage); *Claussen v. Aetna Casualty & Sur. Co.*, 865 F.2d 1217 (11th Cir. 1989) (coverage); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) (no coverage); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551 (9th Cir. 1991) (coverage); *Broderick Investment Co. v. Hartford Accident & Indem. Co.*, 954 F.2d 601 (10th Cir. 1992) (no coverage).

[4] *See supra* note 3. The transaction costs due to this misconception are immense: "[N]early 90% of the money spent by insurers on Superfund claims has gone for legal and related costs rather than for cleaning up pollution." *Insurer Payouts Over Superfund Flow to Lawyers*, Wall St. J., Apr. 24, 1992, at B8. " . . . [T]he lawyers' share could have funded cleanups at 40 polluted sites." *Id.*

I. Why the CERCLA Coverage Issue is a Federal Question.

The lower court's rulings make the ultimate effectiveness of CERCLA dependent on state law, contrary to the principle stated in *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1389 (1990) ("it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law"). Certiorari should be granted under Rule 10.1(c).

"Financial Responsibility," i.e. insurance, is a central feature of the CERCLA scheme for addressing hazardous materials.[5] 42 U.S.C. § 9608 (1988). The statute requires potential polluters to carry "financial responsibility" in specified amounts, and authorizes the EPA (among others) to proceed directly against the insurer if the polluter is impecunious or unavailable. *Id.* § 9608(c). Most importantly, CERCLA authorizes the federal executive branch to "specify policy or other contractual terms, conditions or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of this chapter." *Id.* § 9608(a)(2). Direct actions by the EPA or a polluter against an insurer proceed with the insurer standing in the shoes of the polluter or financially responsible for the polluter's acts. When and under what circumstances an insurer should be responsible under CERCLA is the question presented by this case; not the answer.

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[5] *E.g., United States EPA v. Environmental Waste Control*, 917 F.2d 327 (7th Cir. 1990).

Under the lower court's rule, *state law* determines whether a given insurance policy qualifies as "financial responsibility" under CERCLA § 9608. State law would determine whether the EPA's direct actions can lie against insurers: the EPA's rights could thus vary from state to state, even when the policy language is the same. Insurers who write business nationwide, again on the *same policy form*, potentially face fifty different liability rules and can only determine the liability rules by repetitively litigating the issue. The same holds true for actions by polluters against insurers.

Under this Court's preemption decisions, however, these questions must be decided under federal law. As § 9608(b)(2) authorizes the administrator to "specify policy or other contractual terms, conditions, or defenses," it completely occupies the field of insurance coverage for CERCLA liabilities. Interpretation of insurance policy terms, conditions or defenses in an insurance policy issued pursuant to this statutory authority would unquestionably be a matter of federal, not state, law.[6] Federal law, not state law, determines whether an insurance policy is or is not CERCLA financial responsibility, CERCLA insurance.

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[6] Section 9608 *requires* promulgation of financial responsibility regulations by the President; this authority has been delegated to the EPA per Ex. Ord. No. 12580. The regulations, however, do not yet appear to have been promulgated. EPA has very slowly begun the process. *See* 40 C.F.R. pt. 761 (1991)(final Rule re certain PCB activities effective Jan. 4, 1990); 40 C.F.R. pt. 280 (1991) (Financial Responsibility Requirement for UST's); 40 C.F.R. §§ 387.5, 387.15 (1991) (RCRA policy forms prescribed by rule).

The controlling case, with which the lower court's decision conflicts, is *Gade v. National Solid Waste Management Assoc.*, 112 S. Ct. 2374 (1992). *Gade* addressed the preemptive force of the Superfund Amendments and Reauthorization Act of 1986 ("SARA") Pub.L. 99-499 (1986), and regulations promulgated thereunder, just as this case does. Preemption is "compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* at 2385. Similarly, where a federal scheme is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it" preemption is required. *Id.* Looking at the design of the CERCLA statute, and its "financial responsibility" section, § 9608 in particular, it is evident that allowing states to reach different results on identical policy language directly interferes with the functioning of the statute.[7] This is "conflict preemption." *Id.*

In addition, the intent to replace the traditionally state law domain of insurance coverage in CERCLA areas is expressed by the statute's grant of authority to specify policy "terms, conditions or defenses . . . in order to effectuate the purposes of this chapter."[8] This constitutes

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[7] Indeed, the lower court recognized the *desirability* of a uniform federal rule, *Hudson Ins. Co. v. American Elec. Corp.*, 957 F.2d 826 n.3 (11th Cir. 1992), but felt bound by its prior decision in *Claussen v. Aetna Casualty & Sur. Co.*, 865 F.2d 1217 (11th Cir. 1989).

[8] 42 U.S.C. § 9608(b)(2). Note that *in non-CERCLA pollution areas* there is specific statutory authority for state law to continue its traditional role, 42 U.S.C. § 9672, contained in CERCLA Subchapter IV, "Pollution Insurance."

complete "field preemption" of insurance coverage issues, although it would appear that insurance rate making and claims handling issues remain state law matters. 42 U.S.C. § 9608(d)(2). The "field preemption" is especially apparent when the regulations promulgated by EPA under other, similar, grants of authority are considered. In each case, specific policy language is provided by regulation.[9]

When specific policy language is required by federal administrative rule, policy construction cannot be dependent on state law. There is a federal right to have the federally-prescribed policy language enforced. Therefore, to avoid inconsistent results, insurance policy language generally must be measured under a federal, not state, standard. The right of action, if any, for insurance coverage for CERCLA liabilities is federal in nature, which turns upon resolution of substantial questions of federal

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[9] *See, e.g.*, 40 C.F.R. § 280.97 (1991), promulgating regulations for financial responsibility in connection with underground storage tanks. The regulation specifies precise policy language, including the language determining the scope of coverage. *Id.* at § 280.97(b)(2). This is precisely the type of regulation the EPA is authorized to apply to CERCLA under 42 U.S.C. § 9608(b)(2); it is suggested that the only reason such regulations are not now in place under CERCLA is because the EPA's responsibilities exceed its resources. *See also* 33 C.F.R. § 130.8(c) (specifying policy language for water pollution insurance) (water pollution regulations promulgated by Coast Guard under 42 U.S.C. § 9608, *see* 49 C.F.R. § 1.46(ff)); 40 C.F.R. § 258.74(d) (1991) (policy provisions specified); 40 C.F.R. § 264.151 (1991) ("hazardous waste facility liability endorsement" language specified for RCRA); 40 C.F.R. §§ 387.5, 387.15 (policy forms federally prescribed).

law. *E.g., Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987) (ERISA).

II. Why Jurisdiction Exists.

As the coverage question must be one of federal law, the remaining question is that of jurisdiction. The lower courts interpreted CERCLA's jurisdictional provision, 42 U.S.C. § 9613(b), as mere surplusage, adding nothing to the jurisdiction provided by 28 U.S.C. § 1331: "The underlying dispute in this case arises under state law, not CERCLA." Because the case supposedly did not qualify under § 1331, the lower court thought it could not qualify under CERCLA § 9613(b). The Eleventh Circuit disregarded, however, the language granting jurisdiction over "all controversies arising under this chapter," 42 U.S.C. § 9613(b). This is not a mere reiteration of § 1331 "arising under" jurisdiction.

CERCLA is the direct cause of the "controversy" at issue. The insurance policies existed before CERCLA, as did state insurance laws. But it is the existence of CERCLA liability and the EPA reimbursement demand which uniquely has given rise to the instant controversy. This controversy is thus within the scope of § 9613(b) unless that section was meant merely to duplicate the jurisdiction already provided in § 1331.

Jurisdiction is also conferred independently by § 1331 itself.[10] The presence of *both* conflict preemption and field

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[10] For example, as long ago as 1972 this Court spoke of the federal question jurisdiction inherent in water and air pollution

preemption is so forceful that the state cause of action is displaced by federal law. The polluter's right to insurance coverage necessarily depends on "resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 28 (1983). This ground for jurisdiction, of course, is dependent on the preemption and federal question arguments previously made, which need not be repeated.

CONCLUSION

The Court can smooth the operation of CERCLA by clarifying the rights and obligations of the administration, polluters, responsible persons, and potentially liable insurers. At present, litigation over insurance coverage issues is consuming much of the resources that could otherwise be directed toward cleaning up hazardous materials. It is hard to imagine that Congress envisioned fifty different bodies of law applying to the "financial responsibility" requirements it mandated in § 9608 of CERCLA.

The circuits are in conflict on the ultimate issue of insurance coverage; on the threshold issue of preemption the court is presented with an important and as-yet-

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matters: " ' . . . the logic and practicality of regarding such claims as being entitled to be asserted within the federal-question jurisdiction of § 1331(a) would seem to be self-evident.' " *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972).

unresolved question of federal law. A decision on the merits of both issues would be beneficial to all concerned.

Respectfully submitted this 24th day of August, 1992.

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Attorneys for Petitioner

APPENDIX

APPENDIX A

(logo)

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

AUG 9 1989

NOTIFICATION AND DEMAND FOR PAYMENT LETTER URGENT LEGAL MATTER – PROMPT REPLY NECESSARY CERTIFIED MAIL – RETURN RECEIPT REQUESTED

David L. Howard
Green River Steel Corporation
Highway 60 East
Owensboro, Kentucky 42301

RE: Ellis Road Site, Jacksonville, FL

Dear Mr. Howard:

The United States Environmental Protection Agency (EPA) is currently investigating the circumstances surrounding the use and disposal of hazardous substances and wastes by industrial sources in and around the Ellis Road Site, hereinafter referred to as "the site". The Site is located at 523 South Ellis Road in Jacksonville, Duval County, Florida. The American Electric Company, owned by Mr. Maxwell Cobb, Mr. E.O. Harwell, and Mr. Ellis Warren, used the Site as a staging/repacking facility for the disposal of PCB transformers from 1981 until 1984. In January, 1984, as a result of an explosion and fire at the

Site warehousing/processing building, the EPA conducted sampling across the Site vicinity and found low levels of PCBs present. Soil and residential well testing continued in 1985 and 1986. In March of 1988, the City of Jacksonville requested that the EPA remove rain water that had accumulated in the Site dike areas. The accumulation of water was threatening to float the tanks, making them susceptible to spilling. The rain water was also contaminated by PCBs. In October 1988, the EPA issued an Administrative Order requiring the owners to remove the hazardous substances at the site. The owners declined. In October 1988, the EPA conducted a removal action. The removal action included disposing of PCB contaminated liquids and oils in the tanks, removing water from the diked tank area, as well as crushing and removing the holding tanks.

In its investigation, EPA has obtained information on the history of Site activities which shows that The American Electric Company accepted PCB contaminated transformers and other PCB wastes from businesses across the United States. American Electric invoices indicate that your state did business with the American Electric Corporation.

By this letter, EPA intends to notify you under Section 104(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or the "Superfund law"), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. Section 9601 *et seq.*, of your potential liability for any costs incurred by the EPA in taking corrective actions at the Site, and to demand payment under Section 107(a) for such response costs.

NOTICE OF POTENTIAL LIABILITY

The United States Environmental Protection Agency (EPA) has documented the release or threatened release of hazardous substances, pollutants, or contaminants at the Ellis Road Site. Under Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. Sections 9606 (a) and 9607(a), potentially responsible parties may be liable for all costs incurred by the government in responding to any release or threatened release at the site. Such costs may include, but may not be limited to, expenditures for investigation, planning, cleanup of the site and enforcement. In addition, potentially responsible parties may be required to pay for damages for injury to, destruction of, or loss of natural resources, including the cost of assessing such damages.

EPA has evaluated information in connection with the investigation of the site. Based on this information, EPA has determined that your state is a potentially responsible party (PRP) with respect to this Site. Potentially responsible parties under CERCLA include current and former owners and operators of the Site, persons who generated the hazardous substances or who were involved with the transport, treatment or disposal of hazardous substances.

DEMAND FOR PAYMENT

In accordance with CERCLA and other authorities, EPA has already undertaken certain actions and incurred certain costs in response to conditions at the Site. The EPA expended public funds, $167,728.12 to date, which were

used to investigate and take corrective action for the control of releases of hazardous substances at the Site. In accordance with Section 107(a) of CERCLA, demand is hereby made for payment of the above amount plus any and all interest recoverable under Section 107 or under any other provisions of the law.

Enclosed is a statement summarizing the expenditures for the removal. EPA is currently tabulating additional response costs, including indirect costs, enforcement costs, and interest. Thus, the total response costs are subject to change.

EPA hereby requests that you reimburse the fund within forty-five (45) days from the receipt of this letter in the amount of $167,728.12 for costs associated with this response action. If you desire to discuss your liability with EPA, please contact Mr. William Phillips, Assistant Regional Counsel, at the address below no later than fifteen (15) days from the receipt of this letter. Absent such contact and nonpayment of response costs within forty-five (45) days from receipt of this letter, EPA will assume that you have declined to reimburse the Fund for the Site expenditures and may subsequently pursue litigation against you in the appropriate federal court. Any inquiries to this demand should also be made to:

Mr. William Phillips
Assistant Regional Counsel
U.S. Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365
(404) 347-2641

This letter also serves to notify you that a steering committee comprised of other PRPs involved in the Ellis Road

Site has been established in Atlanta. The committee, led by Charles H. Tisdale, Jr., Esq., has a complete file of all records and invoices found at the Ellis Road Site. The EPA Strongly recommends that you participate in the steering committee. Mr. Tisdale can be reached at the following address:

Charles H. Tisdale, Jr., Esq.
King and Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600

If you need further information, Mr. Phillips can be reached by telephone at (404) 347-2641. Any technical questions should be directed to Ms. Erica Thorgerson at (404) 347-5059.

Your prompt attention to this matter is appreciated.

Sincerely yours,

/s/ Patrick M. Tobin
Patrick M. Tobin
Director
Waste Management Division

Enclosure

APPENDIX B

(logo)

ATHLONE INDUSTRIES, Inc.
200 Webro Road - Parsippany, New Jersey 07054
201 887-9100
212 425-6550

JANE S. POLLACK
Associate General Counsel

August 31, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hudson Insurance Company
280 Park Avenue
New York, NY 10017

Re: Insured: American Electric Corporation; Max Cobb; American Environmental Protection Corporation 523 S. Ellis Road, Jacksonville, FL 32205
Policy #: HA00117

Ladies and Gentlemen:

Our wholly-owned subsidiary, Green River Steel Corporation ("Green River"), is an additional insured on the above-referenced policy issued by you to Max Cobb and American Environmental Protection Corporation, as evidenced by the enclosed certificate dated March 24, 1982, and the enclosed agreement between Green River and American Electric Corporation dated May 6, 1982.

Please be advised that Green River has received from the U.S. Environmental Protection Agency a letter dated August 9, 1989 (copy enclosed) of potential liability and

demand for payment, and may be subject to further costs, in connection with the release or threatened release of hazardous substances, pollutants or contaminants at the Ellis Road Site in Jacksonville, Florida operated by American Electric Corporation.

We are hereby making a claim under the referenced policy, and seek from you full protection and defense of the interests of Green River in this matter.

Very truly yours,

/s/ Jane S. Pollack
Jane S. Pollack

cc: Don L. Tullis & Associates, Inc.
P.O. Drawer 5210
Jacksonville, FL 32207

APPENDIX C

UNITED STATES CODE ANNOTATED TITLE 28.
JUDICIARY AND JUDICIAL PROCEDURE
PART IV – JURISDICTION AND VENUE CHAPTER 85 –
DISTRICT COURTS; JURISDICTION
COPR. (c) WEST 1992 No Claim to Orig. Govt.
Works Current through P.L. 102-284,
approved 5-14-92

s 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103 – COMPREHENSIVE ENVIRONMENTAL
RESPONSE, COMPENSATION, AND LIABILITY
SUBCHAPTER I – HAZARDOUS SUBSTANCES
RELEASES, LIABILITY, COMPENSATION
COPR. (c) WEST 1992 No Claim to Orig. Govt.
Works Current through P.L. 102-284,
approved 5-14-92

s 9601. Definitions

For purpose of this subchapter –

* * *

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of

financial responsibility for an owner or operator under this chapter.

* * *

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103 – COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
SUBCHAPTER I – HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION
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Current through P.L. 102-284, approved 5-14-92

s 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for

transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue

from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by –

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with

respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed –

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C.A. s 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in

section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33 or 46,

subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Rendering care or advice

(1) In general

Except as provided in paragraph (2), no person shall be liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases of a hazardous substance or the threat thereof.

This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

(2) State and local governments

No State or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(3) Savings provision

This subsection shall not alter the liability of any person covered by the provisions of paragraph (1), (2), (3), or (4) of subsection (a) of this section with respect to the release or threatened release concerned.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or

indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Actions involving natural resources; maintenance, scope, etc.

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: Provided, however, That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact

statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be

no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this chapter the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the

purposes of this chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651 of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

(g) Federal agencies

For provisions relating to Federal agencies, see section 9620 of this title.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section, under maritime tort law, and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff) or the absence of any physical damage to the proprietary interest of the claimant.

(i) Application of registered pesticide product

No person (including the United States or any State or Indian tribe) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide,

and Rodenticide Act [7 U.S.C.A. s 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-Closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of

the Solid Waste Disposal Act [42 U.S.C.A. s 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when –

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. s 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C.A. s 6926(b)]) that the conditions imposed by this subsection have been satisfied. If within such ninety-day period the Administrator of the

Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. s 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4) (A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for post-closure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would

be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

(5) Suspension of liability transfer

Notwithstanding paragraphs (1), (2), (3), and (4) of this subsection and subsection (j) of section 9611 of this title, no liability shall be transferred to or assumed by

the Post-Closure Liability Trust Fund established by section 9641 of this title prior to completion of the study required under paragraph (6) of this subsection, transmission of a report of such study to both Houses of Congress, and authorization of such a transfer or assumption by Act of Congress following receipt of such study and report.

(6) Study of options for post-closure program

(A) Study

The Comptroller General shall conduct a study of options for a program for the management of the liabilities associated with hazardous waste treatment, storage, and disposal sites after their closure which complements the policies set forth in the Hazardous and Solid Waste Amendments of 1984 [42 U.S.C.A. s 6901 note] and assures the protection of human health and the environment.

(B) Program elements

The program referred to in subparagraph (A) shall be designed to assure each of the following:

(i) Incentives are created and maintained for the safe management and disposal of hazardous wastes so as to assure protection of human health and the environment.

(ii) Members of the public will have reasonable confidence that hazardous wastes will be managed and

disposed of safely and that resources will be available to address any problems that may arise and to cover costs of longterm monitoring, care, and maintenance of such sites.

(iii) Persons who are or seek to become owners and operators of hazardous waste disposal facilities will be able to manage their potential future liabilities and to attract the investment capital necessary to build, operate, and close such facilities in a manner which assures protection of human health and the environment.

(C) Assessments

The study under this paragraph shall include assessments of treatment, storage, and disposal facilities which have been or are likely to be issued a permit under section 3005 of the Solid Waste Disposal Act [42 U.S.C.A. s 6925] and the likelihood of future insolvency on the part of owners and operators of such facilities. Separate assessments shall be made for different classes of facilities and for different classes of land disposal facilities and shall include but not be limited to –

(i) the current and future financial capabilities of facility owners and operators;

(ii) the current and future costs associated with facilities, including the costs of routine monitoring and

maintenance, compliance monitoring, corrective action, natural resource damages, and liability for damages to third parties; and

(iii) the availability of mechanisms by which owners and operators of such facilities can assure that current and future costs, including post-closure costs, will be financed.

(D) Procedures

In carrying out the responsibilities of this paragraph, the Comptroller General shall consult with the Administrator, the Secretary of Commerce, the Secretary of the Treasury, and the heads of other appropriate Federal agencies.

(E) Consideration of options

In conducting the study under this paragraph, the Comptroller General shall consider various mechanisms and combinations of mechanisms to complement the policies set forth in the Hazardous and Solid Waste Amendments of 1984 to serve the purposes set forth in subparagraph (B) and to assure that the current and future costs associated with hazardous waste facilities, including post-closure costs, will be adequately financed and, to the greatest extent possible, borne by the owners and operators of such facilities. Mechanisms to be considered include, but are not limited to –

(i) revisions to closure, post-closure, and financial responsibility requirements under subtitles C and I of the Solid Waste Disposal Act [42 U.S.C.A. s 6921 et seq. and s 6991 et seq.];

(ii) voluntary risk pooling by owners and operators;

(iii) legislation to require risk pooling by owners and operators;

(iv) modification of the Post-Closure Liability Trust Fund previously established by section 9641 of this title, and the conditions for transfer of liability under this subsection, including limiting the transfer of some or all liability under this subsection only in the case of insolvency of owners and operators;

(v) private insurance;

(vi) insurance provided by the Federal Government;

(vii) coinsurance, reinsurance, or pooled-risk insurance, whether provided by the private sector or provided or assisted by the Federal Government; and

(viii) creation of a new program to be administered by a new or existing Federal agency or by a federally chartered corporation.

(F) Recommendations

The Comptroller General shall consider options for funding any program under this section and shall, to the extent necessary, make recommendations to the appropriate committees of Congress for additional authority to implement such program.

(1) Federal lien

(1) In general

All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which –

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action.

(2) Duration

The lien imposed by this subsection shall arise at the later of the following:

(A) The time costs are first incurred by the United States with respect to a response action under this chapter.

(B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title.

(3) Notice and validity

The lien imposed by this subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the lien has been filed in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this subsection as are afforded under State law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this subsection. If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located. For purposes of this subsection, the terms "purchaser" and "security interest" shall have

the definitions provided under section 6323(h) of Title 26.

(4) Action in rem

The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section.

(m) Maritime lien

All costs and damages for which the owner or operator of a vessel is liable under subsection (a)(l) of this section with respect to a release or threatened release from such vessel shall constitute a maritime lien in favor of the United States on such vessel. Such costs may be recovered in an action in rem in the district court of the United States for the district in which the vessel may be found. Nothing in this subsection shall affect the right of the United States to bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

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s 9608. Financial responsibility

(a) Establishment and maintenance by owner or operator of vessel; amount; failure to obtain certification of compliance

(1) The owner or operator of each vessel (except a nonself-propelled barge that does not carry hazardous substances as cargo) over three hundred gross tons that uses any port or place in the United States or the navigable waters or any offshore facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility of $300 per gross ton (or for a vessel carrying hazardous substances as cargo, or $5,000,000, whichever is greater) to cover the liability prescribed under paragraph (1) of section 9607 of this title. Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, or qualification as a self-insurer. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In cases where an owner or operator owns, operates, or charters more than one vessel subject to this subsection, evidence

of financial responsibility need be established only to meet the maximum liability applicable to the largest of such vessels.

(2) The Secretary of the Treasury shall withhold or revoke the clearance required by section 91 of Title 46 of any vessel subject to this subsection that does not have certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(3) The Secretary of Transportation, in accordance with regulations issued by him, shall (A) deny entry to any port or place in the United States or navigable waters to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection that, upon request, does not produce certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(4) In addition to the financial responsibility provisions of paragraph (1) of this subsection, the President shall require additional evidence of financial responsibility for incineration vessels in such amounts, and to cover such liabilities recognized by law, as the President deems appropriate, taking into account the potential risks posed by incineration and transport for incineration, and any other factors deemed relevant.

(b) Establishment and maintenance by owner or operator of production, etc., facilities; amount; adjustment; consolidated form of responsibility; coverage of motor carriers

(1) Beginning not earlier than five years after December 11, 1980, the President shall promulgate requirements (for facilities in addition to those under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. s 6921 et seq.] and other Federal law) that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.

(2) The level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction. To the maximum extent practicable, the President shall cooperate with and seek the advice of the commercial insurance industry in

developing financial responsibility requirements. Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer. In promulgating requirements under this section, the President is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing such evidence of financial responsibility in order to effectuate the purposes of this chapter.

(3) Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements as quickly as can reasonably be achieved but in no event more than 4 years after the date of promulgation. Where possible, the level of financial responsibility which the President believes appropriate as a final requirement shall be achieved through incremental, annual increases in the requirements.

(4) Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. When evidence of financial responsibility is established in a consolidated form, the proportional share of each participant shall be shown. The evidence shall be accompanied by a statement authorizing the applicant to act for and in behalf of each participant in submitting and

maintaining the evidence of financial responsibility.

(5) The requirements for evidence of financial responsibility for motor carriers covered by this chapter shall be determined under section 30 of the Motor Carrier Act of 1980, Public Law 96-296.

(c) Direct action

(1) Releases from vessels

In the case of a release or threatened release from a vessel, any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for such vessel under subsection (a) of this section. In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this subchapter. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but the guarantor may not invoke any other defense that the guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

(2) Releases from facilities

In the case of a release or threatened release from a facility, any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for such facility under subsection (b) of this section, if the person liable under section

9607 of this title is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code, or if, with reasonable diligence, jurisdiction in the Federal courts cannot be obtained over a person liable under section 9607 of this title who is likely to be solvent at the time of judgment. In the case of any action pursuant to this paragraph, the guarantor shall be entitled to invoke all rights and defenses which would have been available to the person liable under section 9607 of this title if any action had been brought against such person by the claimant and all rights and defenses which would have been available to the guarantor if an action had been brought against the guarantor by such person.

(d) Limitation of guarantor liability

(1) Total liability

The total liability of any guarantor in a direct action suit brought under this section shall be limited to the aggregate amount of the monetary limits of the policy of insurance, guarantee, surety bond, letter of credit, or similar instrument obtained from the guarantor by the person subject to liability under section 9607 of this title for the purpose of satisfying the requirement for evidence of financial responsibility.

(2) Other liability

Nothing in this subsection shall be construed to limit any other State or Federal

statutory, contractual, or common law liability of a guarantor, including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim. Nothing in this subsection shall be construed, interpreted, or applied to diminish the liability of any person under section 9607 of this title or other applicable law.

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s 9609. Civil penalties and awards

(a) Class I administrative penalty
(1) Violations

A civil penalty of not more than $25,000 per violation may be assessed by

the President in the case of any of the following –

(A) A violation of the requirements of section 9603(a) or (b) of this title (relating to notice).

(B) A violation of the requirements of section 9603(d)(2) of this title (relating to destruction of records, etc.).

(C) A violation of the requirements of section 9608 of this title (relating to financial responsibility, etc.), the regulations issued under section 9608 of this title, or with any denial or detention order under section 9608 of this title.

(D) A violation of an order under section 9622(d)(3) of this title (relating to settlement agreements for action under section 9604(b) of this title).

(E) Any failure or refusal referred to in section 9622(1) of this title (relating to violations of administrative orders, consent decrees, or agreements under section 9620 of this title).

(2) Notice and hearings

No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation.

(3) Determining amount

In determining the amount of any penalty assessed pursuant to this subsection,

the President shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(4) Review

Any person against whom a civil penalty is assessed under this subsection may obtain review thereof in the appropriate district court of the United States by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the President. The President shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed. If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the President may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record.

(5) Subpoenas

The President may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Class II administrative penalty

A civil penalty of not more than $25,000 per day for each day during which the violation continues may be assessed by the President in the case of any of the following –

(1) A violation of the notice requirements of section 9603(a) or (b) of this title.

(2) A violation of section 9603(d)(2) of this title (relating to destruction of records, etc.).

(3) A violation of the requirements of section 9608 of this title (relating to financial responsibility, etc.), the regulations issued under section 9608 of this title, or with any

denial or detention order under section 9608 of this title.

(4) A violation of an order under section 9622(d)(3) of this title (relating to settlement agreements for action under section 9604(b) of this title).

(5) Any failure or refusal referred to in section 9622(1) of this title (relating to violations of administrative orders, consent decrees, or agreements under section 9620 of this title).

In the case of a second or subsequent violation the amount of such penalty may be not more than $75,000 for each day during which the violation continues. Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for hearing on the record in accordance with section 554 of Title 5. In any proceeding for the assessment of a civil penalty under this subsection the President may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures. Any person who requested a hearing with respect to a civil penalty under this subsection and who is aggrieved by an order assessing the civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

(c) Judicial assessment

The President may bring an action in the United States district court for the appropriate district to assess and collect a penalty of not more than $25,000 per day for each day during which the violation (or failure or refusal) continues in the case of any of the following –

(1) A violation of the notice requirements of section 9603(a) or (b) of this title.

(2) A violation of section 9603(d)(2) of this title (relating to destruction of records, etc.).

(3) A violation of the requirements of section 9608 of this title (relating to financial responsibility, etc.), the regulations issued under section 9608 of this title, or with any denial or detention order under section 9608 of this title.

(4) A violation of an order under section 9622(d)(3) of this title (relating to settlement agreements for action under section 9604(b) of this title).

(5) Any failure or refusal referred to in section 9622(1) of this title (relating to violations of administrative orders, consent decrees, or agreements under section 9620 of this title).

In the case of a second or subsequent violation (or failure or refusal), the amount of such penalty may be not more than $75,000 for each day during which the violation (or failure or refusal) continues. For additional provisions providing for judicial assessment of civil penalties for

failure to comply with a request or order under section 9604(e) of this title (relating to information gathering and access authorities), see section 9604(e) of this title.

(d) Awards

The President may pay an award of up to $10,000 to any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under this chapter, including any violation of section 9603 of this title and any other violation referred to in this section. The President shall, by regulation, prescribe criteria for such an award and may pay any award under this subsection from the Fund, as provided in section 9611 of this title.

. . . .

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103 – COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
SUBCHAPTER I – HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION
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Current through P.L. 102-284, approved 5-14-92

s 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

(e) Nationwide service of process

In any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process.

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall

diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resources damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days

after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced –

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical onsite construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after –

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation

No action based on rights subrogated pursuant to this section by reason of payment of a claim may be commenced under this subchapter more than 3 years after the date of payment of such claim.

(5) Actions to recover indemnification payments

Notwithstanding any other provision of this subsection, where a payment pursuant to an indemnification agreement with a response action contractor is made under section 9619 of this title, an action under section 9607 of this title for recovery of such indemnification payment from a potentially responsible party may be brought at any time before the expiration of 3 years from the date on which such payment is made.

(6) Minors and incompetents

The time limitations contained herein shall not begin to run –

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(h) Timing of review

No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to

removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(i) Intervention

In any action commenced under this chapter or under the Solid Waste Disposal Act [42 U.S.C.A. s 6901 et seq.] in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the

President or the State shows that the person's interest is adequately represented by existing parties.

(j) Judicial review

(1) Limitation

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages

only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

(k) Administrative record and participation procedures

(1) Administrative record

The President shall establish an administrative record upon which the President shall base the selection of a response action. The administrative record shall be available to the public at or near the facility at issue. The President also may place duplicates of the administrative record at any other location.

(2) Participation procedures

(A) Removal action

The President shall promulgate regulations in accordance with chapter 5 of Title 5 of the United States Code establishing procedures for the appropriate participation of interested persons in the development of the administrative record on which the President will base the selection of removal actions and on which judicial review of removal actions will be based.

(B) Remedial action

The President shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President

will base the selection of remedial actions and on which judicial review of remedial actions will be based. The procedures developed under this subparagraph shall include, at a minimum, each of the following:

(i) Notice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.

(ii) A reasonable opportunity to comment and provide information regarding the plan.

(iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).

(iv) A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

(v) A statement of the basis and purpose of the selected action.

For purposes of this subparagraph, the administrative record shall include all items developed and received under this subparagraph and all items described in the second sentence of section 9617(d) of this title. The President shall promulgate regulations in accordance with chapter 5 of Title 5 of the United States Code to carry out the requirements of this subparagraph.

(C) Interim record

Until such regulations under subparagraphs (A) and (B) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this chapter shall not include an adjudicatory hearing.

(D) Potentially responsible parties

The President shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this paragraph shall be construed to be a defense to liability.

(1) Notice of actions

Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103 – COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
SUBCHAPTER IV – POLLUTION INSURANCE
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Current through P.L. 102-284, approved 5-14-92

s 9672. State laws; scope of subchapter

(a) State laws

Nothing in this subchapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State. The definitions of pollution liability and pollution liability insurance under any State law shall not be applied for the purposes of this subchapter, including recognition or qualification of risk retention groups or purchasing groups.

(b) Scope of title

The authority to offer or to provide insurance under this subchapter shall be limited to coverage of pollution liability risks and this subchapter does not authorize a risk retention group or purchasing group to provide coverage of any other line of insurance.

92-434

No. _____

Supreme Court, U.S.
FILED
AUG 25 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

HUDSON INSURANCE COMPANY,
a Delaware corporation,

Petitioner,

vs.

AMERICAN ELECTRIC CORP., a Florida corporation, AMERICAN ENVIRONMENTAL PROTECTION CORP., a Florida corporation, AMELCO INVESTMENT CORP., a Florida corporation, EASTERN ELECTRIC CORP., INC., a Florida corporation, DON L. TULLIS AND ASSOCIATES, INC., a Florida corporation, and GREEN RIVER STEEL CORP., a Delaware corporation,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-4033

HUDSON INSURANCE COMPANY,

Plaintiff-Appellant,

versus

AMERICAN ELECTRIC CORPORATION, a Florida corporation, AMERICAN ENVIRONMENTAL PROTECTION CORP., a Florida corporation, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed May 28, 1992)

Before: BIRCH, Circuit Judge, TUTTLE, Senior Circuit Judge, and FULLAM*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

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* Honorable John P. Fullam, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

HUDSON INSURANCE COMPANY,
Plaintiff-Appellant,

v.

AMERICAN ELECTRIC CORPORATION, a Florida corporation, American Environmental Protection Corp., a Florida corporation, et al., Defendants-Appellees.

No. 90-4033.

United States Court of Appeals,
Eleventh Circuit.

April 3, 1992.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH, Circuit Judge, TUTTLE, Senior Circuit Judge, and FULLAM*, Senior District Judge.

BIRCH, Circuit Judge:

This case involves an insurance coverage dispute. Defendant Green River Steel Corporation ("Green River") is allegedly an additional named insured on the comprehensive general liability insurance policy issued by plaintiff Hudson Insurance Company ("Hudson") to defendant American Electric Corporation ("AEC"). In 1982, Green River hired AEC to remove and properly dispose of Green River's transformers which had been contaminated by polychlorinated biphenyl (commonly known as PCB). AEC's deficient handling and disposal practices

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* Honorable John P. Fullam, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

prompted a response by the federal Environmental Protection Agency ("EPA").

In 1989, the EPA informed Green River that pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988) ("CLERCLA"), Green River was potentially responsible for the costs incurred by the EPA in cleaning up the hazardous substances found at AEC's disposal site. In turn, Green River informed Hudson that if it was liable for cleanup costs to the EPA, it would seek payment for that liability under AEC's insurance policy. Hudson subsequently filed this federal lawsuit, seeking a declaratory judgment that its insurance policy in favor of AEC does not provide coverage for CERCLA-imposed pollution liability.

In a comprehensive and studied opinion, the United States District Court for the Middle District of Florida dismissed the case for lack of subject matter jurisdiction. *See Hudson Ins. Co. v. American Elec. Corp.*, 748 F.Supp. 837 (M.D. Fla.1990). Because the parties in this action lack complete diversity, the district court reasoned that it had jurisdiction over the dispute only if the underlying cause of action arose under federal law within the meaning of the federal question jurisdiction statute, 28 U.S.C. § 1331 (1988). Finding that "the underlying action is a suit for the proceeds of an insurance policy" and that "[this] kind of action is usually a matter of state law, not a federal question," *Hudson Ins. Co.*, 748 F. Supp. at 840, the court concluded that Section 1331 did not empower it to hear the case. *Id.* at 845. We AFFIRM.

I. DISCUSSION

A. *Section 1331 Does Not Grant Jurisdiction Because The Underlying Action Arises Under State Law*

In order to determine whether a claim arises under federal law within the meaning of Section 1331, a court must ascertain if a federal cause of action would appear on the face of a well-pleaded complaint. *See, e.g., Louisville and Nashville R.R. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908). Because this is an action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1988), the normal position of the parties is reversed; therefore, we do not look to the face of the declaratory judgment complaint in order to determine the presence of a federal question. Instead, this court must determine whether or not the cause of action anticipated by the declaratory judgment plaintiff arises under federal law. *See, e.g., Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671-72, 70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950). "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim." *Public Serv. Comm'n v. Wycoff Co.,* 344 U.S. 237, 248, 73 S.Ct. 236, 242, 97 L.Ed. 291 (1952).

Here, it is obvious that the cause of action threatened by the declaratory defendant (Green River) and anticipated by the declaratory plaintiff (Hudson) arises under state law. "A suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne and Rowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916). A suit to recover insurance proceeds is created by state law.[1] Essentially, Green River has a potential state cause of action against Hudson based upon the applicable state law governing the interpretation of insurance contracts. The federal CERCLA issues pressed by Hudson in its declaratory judgment complaint are mere potential defenses to Green River's state-created cause of action. These possible federal defenses are insufficient to confer jurisdiction under Section 1331. *See, e.g., Public Serv. Comm'n*, 344 U.S. at 248, 73 S.Ct. at 242-43; *Skelly Oil*, 339 U.S. at 672, 70 S.Ct. at 879. Because the underlying insurance dispute in this case arises under state law, the district court correctly dismissed the case for want of subject matter jurisdiction.[2]

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[1] Hudson correctly observes that federal law (CERCLA) creates the liability for which Green River might seek reimbursement. This fact does not matter. A suit does not arise under the law that creates the *liability*; rather, a suit arises under the law that creates the *cause of action*. In this case, that law is state law.

[2] It is true that some provisions of CERCLA have been construed as creating federal causes of action. *E.g.*, 42 U.S.C. § 9607(a) (1988); *Id.* § 9613(f)(1). In addition, at least one CERCLA-created federal cause of action could conceivably involve an insurance company. *See id.* § 9608(c)(2). Even so, Hudson's suggestion that these potential federal causes of action create federal subject matter jurisdiction in this particular

B. *The Unusual Circumstances Under Which A State Cause Of Action Would Nevertheless Arise Under Federal Law Are Not Present*

There are three situations in which a state cause of action might nevertheless arise under federal law. First, when a prospective plaintiff's right to state-created relief necessarily requires an interpretation of a substantial federal issue, his claim for such relief might arise under federal law within the meaning of Section 1331. Second, if a prospective plaintiff's right to state-created relief is paralleled by a substantially similar federal cause of action with sufficient preemptive force, her claim for such relief might also arise under federal law within the meaning of Section 1331. Finally, regardless of Section 1331, Congress may be able to provide (in a separate jurisdictional statute) that certain state causes of action are nevertheless cognizable in federal court. None of these three theories grant subject matter jurisdiction in this case.

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suit must be rejected. These potential federal causes of action are neither anticipated by Hudson's declaratory judgment complaint nor threatened by Green River. The only cause of action anticipated and threatened in this case is Green River's cause of action for the recovery of insurance proceeds. Quite simply, if Green River wanted to sue Hudson to collect upon AEC's insurance policy, it would be required to sue pursuant to state contract law, not pursuant to Section 9607(a). Section 9613(f)(1). Section 9608(c)(2), or any other provision of CERCLA. Therefore, the underlying cause of action in this case arises under state law, not CERCLA.

1. State causes of action which turn upon federal law.

The Supreme Court has interpreted Section 1331 such that a cause of action need not necessarily be created by federal law in order to arise under federal law. Instead, state-created causes of action can sometimes arise under federal law when the potential state court plaintiff's "right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 28, 103 S.Ct. 2841, 2856, 77 L.Ed.2d 420 (1983); *see also id.* at 9, 103 S.Ct. at 2846; *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808-09, 106 S.Ct. 3229, 3232-33, 92 L.Ed.2d 650 (1986). Hudson argues that this principle grants Section 1331 jurisdiction in this case. In essence, Hudson asserts that the central issue in Green River's potential lawsuit – whether the language of AEC's insurance policy provides coverage for CERCLA-created pollution liability – must necessarily be determined by reference to federal law. Therefore, Hudson contends even if the underlying insurance action in this case arises under state law, Section 1331 would nevertheless grant jurisdiction because Green River's right to recover upon AEC's insurance policy would necessarily turn upon substantial questions of federal law.

Hudson's contention that federal law governs the insurance issues in this case is foreclosed by two prior panel decisions of this circuit. In *Claussen v. Aetna Casualty & Surety Co.*, 865 F.2d 1217 (11th Cir.1989) (per curiam), the panel clearly indicated that these insurance issues – in particular, whether or not a comprehensive

general liability policy covers CERCLA-created liability – must be resolved by reference to *state* law. *See id.* at 1218-19; *see also id.* at 1217 (observing that the interpretation of an insurance contract provision is "peculiarly a question of state law"). Because the relevant state law in *Claussen* was unclear, we certified the question to the Georgia Supreme Court. *See id,* at 1217, 1219-20. Subsequently, in *Industrial Indemnity Insurance Co. v. Crown Auto Dealerships, Inc.*, 935 F.2d 240 (11th Cir.1991), we determined that a similar dispute involving insurance coverage of CERCLA-created liability raised an unresolved "important issue of Florida law" and accordingly certified the question to the Florida Supreme Court. *Id.* at 241, 243. These two decisions defeat Hudson's argument the Green River's potential insurance action would necessarily require the resolution of substantial questions of federal law.[3] Fairly read, *Claussen* and *Industrial Indemnity* instruct that the underlying action in this dispute would

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[3] Hudson's arguments to the effect that the insurance coverage issues in this case *should* turn upon federal law are not completely without merit. However, as a panel of this circuit we are bound by *Claussen* and *Industrial Indemnity* until those decisions are overruled by an *en banc* court. *See United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986). Accordingly, Hudson's claim that a uniform federal rule of decision should govern cases of this type is more appropriately addressed in a motion for rehearing *en banc*. We express no opinion on the question of whether the development of a federal common law in this area would be sufficient to establish Section 1331 jurisdiction.

turn upon state law.[4] Therefore, there is no subject matter jurisdiction under this theory of Section 1331.

2. Preemption by a parallel federal cause of action.

A potential state court plaintiff could not defeat federal subject matter jurisdiction solely by pleading his state cause of action without reference to a sufficiently preemptive parallel federal cause of action. *See Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 340 (6th Cir.1967), *affd*, 390 U.S. 557, 560, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968). For example, *Avco Corp.* has come to stand for the proposition that a state court litigant cannot defeat Section 1331 jurisdiction over actions arising under Section 301 of the Labor Management Relations Act because "the preemptive force of [Section] 301 is so powerful as to displace entirely any state cause of action. . . ." *Franchise Tax Bd.*, 463 U.S. at 23, 103 S.Ct. at 2853. Therefore, the *Avco Corp.* Court ruled that the plaintiff's cause of action based solely upon state contract law nevertheless arose under federal law (and was therefore removable by the defendant). *See Avco Corp.*, 376 F.2d at 340. Hudson argues that this theory of Section 1331 confers jurisdiction

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[4] Hudson correctly observes that whether or not CERCLA completely preempts state insurance causes of action in this area would be determined by reference to federal law, not state law. However, this federal issue can arise in the underlying action only as a potential defense to Green River's threatened state claim for the recovery of insurance proceeds. Therefore, the presence of this possible federal defense is insufficient to create Section 1331 jurisdiction. *See, e.g., Franchise Tax Bd.*, 463 U.S. at 13-14, 103 S.Ct. at 2848.

in this case because CERCLA is so pervasive that if Green River brought a state law insurance action, such a suit would be completely preempted by CERCLA and therefore arisen under federal law.

Hudson's reliance upon this theory of Section 1331 is misplaced. This aspect of Section 1331 confers federal jurisdiction over admittedly state-created causes of action only when there is a sufficiently preemptive parallel federal cause of action that the state court litigant could have brought. In this case, Green River would be required to bring a state cause of action in order to sue Hudson on AEC's contract; there is no parallel federal cause of action *for the recovery of insurance proceeds for CERCLA-created liability. See supra* note 2, Therefore, because Green River's potential state cause of action against Hudson has no preemption parallel federal counterpart, Section 1331 does not confer federal jurisdiction over that state suit. *See Franchise Tax Bd.*, 463 U.S. at 26, 103 S.Ct. at 2855.[5]

3. Jurisdiction statutes other than Section 1331.

Because Article III of the Constitution provides the judiciary with the constitutional power to receive jurisdiction broader than that conferred by Section 1331, *see*

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[5] In fact, there is some evidence that CERCLA anticipated that state court suits would be brought in order to collect insurance proceeds for CERCLA-created liability. *See, e.g.*, 42 U.S.C. § 9607(c)(1) (1988) (providing that CERCLA does not "bar any agreement to insure, hold harmless or indemnify a party to such agreement for any liability under this section"); *id.* § 9672(a) (stating that the insurance subchapter of CERCLA should not be construed so as to affect the "law governing the interpretation of insurance contracts of any State").

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495, 103 S.Ct. 1962, 1972, 76 L.Ed.2d 81 (1983), Congress might be able to grant the jurisdiction to hear state-created causes of action even when those causes of action failed to arise under federal law within the meaning of Section 1331. *See Franchise Tax Bd.*, 463 U.S. at 8 n. 8, 103 S.Ct. at 2846 n. 8. Hudson contends that the jurisdiction provision contained with CERCLA, 42 U.S.C. § 9613(b) (1988), expresses a congressional desire to go beyond Section 1331 in order to grant federal courts the jurisdiction to hear cases such as Green River's potential insurance suit against Hudson, even though these potential suits are state-created.

Hudson's argument is interesting. Congress may indeed have the constitutional ability to empower federal courts to hear these state-created insurance claims. However, Hudson's argument is belied by the explicit language of CERCLA's jurisdictional provision: "district courts shall have exclusive original jurisdiction over all controversies *arising under this chapter*, without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. § 9613(b) (1988) (emphasis added). As we have repeatedly mentioned, the underlying insurance dispute in this case arises under state law, not CERCLA. *See supra* notes 1-2 and accompanying test. Therefore, the language of CERCLA's jurisdictional provision does not independently grant subject matter jurisdiction over state-created insurance causes of action which may implicate CERCLA.

II. CONCLUSION

The district court correctly concluded that it lacked subject matter jurisdiction over this dispute. AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

HUDSON INSURANCE COMPANY, etc.,

Plaintiff,

vs. Case No. 89-869-Civ-J-12

AMERICAN ELECTRIC CORPORATION, etc. et al.,

Defendants.

ORDER DISMISSING CASE

This cause is before the Court on several motions. Plaintiff submitted a Motion for Summary Judgment, filed herein on April 11, 1990. Defendant Don L. Tullis and Associates, Inc. subsequently moved, on April 23, 1990, to adopt that motion. Defendant Green River Steel Corporation responded with a memorandum in opposition to the motion and a Motion for Judgment on the Pleadings, both filed herein on May 15, 1990. Plaintiff responded with a memorandum in opposition to that motion, filed herein on June 1, 1990. By leave of the Court, reply memoranda also have been filed.

A central issue raised in opposition to the summary judgment motion, and the basis for the motion for judgment on the pleadings, is this Court's jurisdiction. The Court is obligated to resolve this issue as a threshold matter. *See Insurance Company of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). "[I]f a party

raises an issue of subject matter jurisdiction on his motion for a judgment on the pleadings, the court will treat the motion as if it had been brought under Rule 12(b)(1)." 5A C WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367, at 516 (2d ed. 1990). Because the Court concludes that jurisdiction is lacking, this case will be dismissed.

Plaintiff Hudson Insurance Company ("Hudson") filed suit, alleging jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, to obtain a declaration that it is not liable to defendants, in particular defendant Green River Steel Corporation ("Green River"), for response and recovery costs incurred by the Environmental Protection Agency ("EPA") for the clean-up of polychlorinated biphenyl ("PCB") contaminated transformers. Green River contracted with defendant American Electric Corporation ("AEC") for handling and disposal of PCB transformers. AEC's handling and disposal practices at a facility situated at 523 Ellis Road, Jacksonville, Florida, eventuated the EPA's response activities.

Hudson provided insurance to AEC. When EPA informed Green River that it might be liable to pay for the expenses incurred in the PCB disposal and site clean-up, Green River in turn informed Hudson that if liable it would seek payment from Hudson on AEC's insurance policy. Hudson subsequently filed this action. In the complaint, Hudson prays for the Court's declaration on two issues. First, Hudson seeks a declaration that it is not a

"potentially liable party" under CERCLA. Second, Hudson asks for a declaration that the insurance policy upon which Green River made its demand does not provide coverage for the CERCLA response and recovery costs.

Green River affirmatively asserted in its answer that the Court lacked subject matter jurisdiction. Moreover, at the preliminary pretrial conference defendants' attorneys stated there is no dispute over the "potentially liable party" issue because no defendant has ever contended that Hudson fits the statutory definition of a potentially liable party. In its Memorandum of Law in Support of Motion for Summary Judgment, at 4 n.7, Hudson concedes, "[n]either EPA nor any Defendant has made claim for reimbursement or contribution from HUDSON as a [potentially liable party]."

The Court will not consider the "potentially liable party" issue on the matter of jurisdiction. Hudson's concession must be read as an admission that no justiciable controversy existed concerning that issue. *Cf. Wendy's Int'l Inc. v. City of Birmingham*, 868 F.2d 433, 436 (11th Cir. 1989). Subject matter jurisdiction in this case is measured exclusively by the presence or absence of a federal question in the insurance coverage issue.

The first step in evaluating jurisdiction in this declaratory judgment action is to untangle the procedural posture of the case. *See Provident Life & Acc. Ins. Co. v. Transamerica-Occidental Life Ins. Co.*, 850 F.2d 1489, 1491 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1534 (1989). The declaratory judgment device allows Hudson to anticipate an action or actions against it and preemptively strike by

obtaining a ruling on dispositive legal issues. The Declaratory Judgment Act, however, does not confer jurisdiction on this action. *See, e.g., Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Rather, the Court must reconstruct the underlying action and evaluate the jurisdiction issue in that instance.

The reconstructed action must respect the well-pleaded complaint rule. Under this rule, as applied in the process of reconstruction, the Court determines whether a claim "arises under" federal law from what necessarily would appear in the statement of claim that would be set forth in the anticipated action; a defense to the anticipated action that raises a federal question is insufficient to confer federal jurisdiction. *See Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952) ("if the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for declaratory judgment establishing a defense to that claim."); *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 16, 19 n.19 (1983) (jurisdiction lacking when federal question is element of defense only). An independent corollary to the well-pleaded complaint rule, the "complete preemption" doctrine, appears to be at issue here. This doctrine holds that some statutes have a preemptive force so extraordinary that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life Ins. Co. v. Taylor* 481 U.S. 58, 65 (1987). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a

federal claim, and therefore arises under federal law." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 393 (1987).

Hudson's concern in filing this suit was the potential liability for payment under AEC's insurance policy that Green River might assert. Indeed, Green River counterclaimed in this action, contingent on a finding of subject matter jurisdiction for Hudson's action, for declaratory relief in its favor on the matter of insurance coverage and for attorney fees and costs pursuant to Fla. Stat. § 627.428. Simply put, the underlying action is a suit for the proceeds of an insurance policy. That kind of action is usually a matter of state law, not a federal question.

Hudson is not without theories that suggest the existence of federal question jurisdiction. Two principle arguments emerge in Hudson's response to the motion for judgment on the pleadings. One, federal law must be consulted to determine whether an insurance policy falls within the savings clause portion of 42 U.S.C. § 9607(e)(1). Therefore, a federal question is presented in the form of the interpretation of CERCLA, construction of its provisions and their application to insurance policies. Within this argument Hudson proposes that CERCLA completely preempts state law on the issue of liability under an insurance policy. Two, Hudson relies upon the grant of original exclusive jurisdiction to the district court for all controversies "arising under" CERCLA. While Hudson does not fully draw the contours of this argument, the Court infers an allusion to the "complete preemption" doctrine stemming from the preemption arguments Hudson presses in the first theory.

Hudson concedes that its theories are novel. In its review of the case law, Hudson notes,

> In the nearly ten years since the adoption of CERCLA, both state and federal courts have been asked to apply state common law principles to construe insurance policies, such as [commercial umbrella liability] policies, in regard to CERLA coverage. However, the fundamental analysis has been overlooked: was the policy an *agreement to insure CERCLA liability under federal law?*

Memorandum of Law in Support of Motion for Summary Judgment, at 8. The federal cases bear out Hudson's observation, as they uniformly predicate jurisdiction on the diversity of the parties' citizenship and apply state law.[1] Moreover, a legion of state court decisions stand in

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[1] *See FL Aerospace v. Aetna Cas. & Sur. Co.*, 897 F.2d 214, 217 (6th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3137 (U.S. Aug. 15, 1990) (No. 90-289); *Claussen v. Aetna Cas. & Sur. Co.*, 865 F.2d 1217, 1219, *further proceedings*, 888 F.2d 747 (11th Cir. 1989); *Avondale Indus., Inc. v. Travelers Indemnity Co.*, 887 F.2d 1200, 1202 (2d Cir. 1989), *reh'g denied*, 894 F.2d 498 (2d Cir.), *cert. denied*, 110 S.Ct. 2588 (1990); *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1147 (2d Cir. 1989); *Maryland Cas. Co. v. Armco*, 822 F.2d 1348 (4th Cir. 1987) (*aff'g* 643 F.Supp. 430, 431 (D.Md. 1986)), *cert. denied*, 484 U.S. 1008 (1988); *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1326-27 (4th Cir. 1986); *A. Johnson & Co. v. Aetna Cas. & Sur. Co.*, 741 F. Supp. 298, 299 (D. Mass. 1990); *Industrial Indemn. Ins. Co. v. Crown Auto Dealerships, Inc.*, 731 F. Supp. 1517 (M.D. Fla. 1990) (pretrial stipulation filed Feb. 28, 1990, relies on diversity as jurisdictional basis), *appeal filed*, Dkt. No. 90-3359 (11th Cir. April 17, 1990); *Federal Ins. Co. v. Susquehanna Broadcasting Co.*, 727 F. Supp. 169, 170 (M.D. Pa. 1989), *reconsidered in part*, 738 F. Supp. 896 (M.D. Pa. 1990); *U.S. Fidelity & Guaranty Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139,

contradiction to Hudson's theory of exclusive federal jurisdiction.[2] Finally, informed commentary on

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1164 (W.D. Mich. 1988); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 685 F. Supp. 621, 623 (E.D. Mich. 1987), *further proceedings*, 702 F. Supp. 1317 (E.D. Mich. 1988), *reconsideration denied*, 720 F. Supp. 597 (E.D. Mich. 1989); *Detrex Chem. Indus., Inc. v. Employers Ins. of Wausau*, 681 F. Supp. 438, 455 (N.D. Ohio 1987), *reconsideration denied*, ___ F. Supp. ___, 1990 W.L. 132694 (N.D. Ohio Apr. 12, 1990); *Pepper's Steel & Alloys, Inc. v. U.S. Fidelity & Guaranty Co.*, 668 F. Supp. 1541, 1544 (S.D. Fla. 1987); *National Grange Mutual Insurance Co. v. Continental Cas. Ins. Co.*, 650 F. Supp. 1404, 1407 (S.D.N.Y. 1986); *but see Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979 (4th Cir. 1988) (jurisdictional basis not stated, but U.S. government named as defendant); *Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., Inc.*, 842 F.2d 977 (8th Cir.) (jurisdictional basis not apparent from en banc or panel opinion, but state law applied), *cert. denied*, 488 U.S. 821 (1988); *EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co.*, 701 F. Supp. 399, 400 (W.D.N.Y. 1988) (jurisdictional basis not stated, but state law applied), *aff'd*, 905 F.2d 8 (2d Cir. 1990); *State of New York v. AMRO Realty Corp.*, 697 F. Supp. 99, 107 (N.D.N.Y. 1988) (third-party action against insurers rested on diversity jurisdiction), *reconsideration denied*, ___ F.Supp.___, 1990 WL 129291 (N.D.N.Y. Sept. 5, 1990).

[2] *See, e.g., AIU Ins. Co. v. Superior Court*, 213 Cal. App. 3d 1219, 262 Cal. Rptr. 182, *rev. granted*, 264 Cal. Rptr. 354, 782 P. 2d 595 (1989); *Aerojet-General Corp. v. San Mateo County Superior Court*, 209 Cal. App. 3d 973, 257 Cal. Rptr. 621, *reh'g denied & rev. denied*, 211 Cal. App. 3d 216, 258 Cal. Rptr. 684 (1989); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 559 A.2d 1301 (Del. Super. 1988); *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989); *U.S. Fidelity & Guaranty Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378, 535 N.E.2d 1071, *appeal denied*, 127 Ill. 2d 643, 545 N.E.2d 133 (1989); *International Minerals & Chem. Co. v. Liberty Mutual Ins. Co.*, 168 Ill. App. 3d 361, 522 N.E.2d 758, *appeal denied*, 112 Ill. 2d 576, 530 N.E.2d 246 (1988); *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 88-CA-2405-MR, 1990 WL 22793 (Ky. App. Mar. 9, 1990), *rev.*

comprehensive general liability policies, and the pollution exclusion in particular, has worked entirely within the framework of state law, as it applies to insurance policies covering CERCLA liabilities.[3]

On the few occasions when the choice between federal and state law has been raised in related contexts, the state law concerning insurance has prevailed.[4] *See, e.g.*

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granted, No. 90-SC-242-DG (Ky. Sept. 19, 1990); *Hazen Paper Co. v. U.S. Fidelity & Guaranty Co.*, 407 Mass 689, 555 N.E.2d 576 (1990); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990); *Technicon Elec. Corp. v. American Home Assurance Co.*, 74 N.Y.2d 68, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989); *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 784 P.2d 507 (1990); *Liberty Mutual Ins. Co. v. Triangle Indus., Inc.*, 390 S.E.2d 562 (W. Va. 1990); *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990); *see also* Note, *Forum Non Conveniens and Comprehensive Hazardous Waste Coverage Suits*, 90 COLUM. L. REV. 1066, 1071 (1990) (typically comprehensive declaratory judgment actions by CERCLA-liable parties against insurers are brought in state court).

[3] *See e.g.*, Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 961-66 (1988); *Ballard & Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 Cornell L. Rev. 610 (1990); *The CGL Policy and the Pollution Exclusion Clause: Using the Drafting History to Raise the Interpretation Out of the Quagmire*, 23 COLUM. J.L. & SOC. PROB. 233 (1990); Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237 (1986); *Developments in the Law – Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1573-85 (1986); Note, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897.

[4] The matter has arisen in the context of defining whether CERCLA response costs constitute "damages" under an otherwise applicable insurance policy. Two cases decided by the Fourth Circuit Court of Appeals apparently consult federal law to determine the legal or equitable nature of CERCLA response

Intel Corp. v. Hartford Acc. & Indemn. Co., 692 F. Supp. 1171, 1186-87 (N.D. Cal. 1988). As one commentator explains,

> CERCLA does define certain cognizable harms for which the responsible party may become liable. But CERCLA never purports to define the relationship between an insurer and the insured for the purposes of allocating the costs of this liability. . . . [O]nce the scope of liability is defined by CERCLA, the scope of the insured's coverage for this liability should be determined under state law.

Comment, *Insurance coverage of CERCLA Response Costs: The Limits of "Damages" in Comprehensive General Liability Policies*, 16 ECOLOGY L.Q. 755, 779 (1989).

The Court approaches Hudson's novel theories with some caution. It would be imprudent to ignore the Eleventh Circuit's treatment of a CERCLA insurance issue in

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costs. *See Armco*, 822 F.2d AT 1352-54; *Mraz*, 804 F.2d at 1328-29. Cases from other jurisdictions expressly choose to rest solely on the interpretation of state law. *See, e.g., Northeastern Pharmaceutical*, 842 F.2d at 985-86 (en banc opinion); *Intel Corp.*, 692 F. Supp. at 1186-88; *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W. 2d 838, 842-43 (1983). The interjection of federal law into this matter by the first line of cases, however, arises only as an element of a defense to a traditional state law claim. Federal law is employed solely to describe the nature of the insurance claim asserted; state law determines whether the insurance claim, so described, is covered by the policy. This role for federal law, if it ultimately prevails over the second line of cases, still is consistent with the ruling herein, as the use of federal law as an element of a defense is insufficient to confer subject matter jurisdiction.

Claussen as a matter of state law best resolved by certification of a question to the Georgia Supreme Court. While Hudson is correct in the strictest sense that the Eleventh Circuit did not explicitly consider the option of federal common law, this Court does not lightly infer that this option was simply "overlooked" by the Court of Appeals. Consequently, the Court demands a strong showing on Hudson's part to overcome the overwhelming weight of authority that stands in contradiction to the arguments underlying the assertion of exclusive federal jurisdiction.

The notion that § 9607(e)(1) creates federal jurisdiction on its own can be dismissed without much ado. The relevant portion of the statute states: "Nothing in the subsection shall bar any agreement to insure . . . a party to such agreement for any liability under this section." If Hudson is correct in asserting that a court must decide as a matter of federal law whether an insurance policy is one to insure CERCLA liability,[5] this issue alone does not

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[5] Hudson is not correct in this assertion. The second sentence of subsection 9607(e)(1), quoted above, is paired with a sentence that bans agreements that purport to transfer liability from a statutorily liable party to some other party. The tension between the first and second sentence has been widely noted. It is resolved by "giv[ing] effect to contracts binding parties otherwise not liable, to indemnify or insure liable parties." *Am Int'l, Inc. v. International Forging Equip.*, No. C88-2037, ___ F. Supp. ___, 1990 WL 103154, 5 (N.D. Ohio June 29, 1990).

> That is, a liable party remains liable (e.g., to the United States) regardless of whether it has an indemnity agreement, but the liable party still may proceed against a third party (e.g., an insurance company) which has agreed to indemnify the liable party. This

create jurisdiction. The determination of the nature of the insurance policy fits within the framework of a state law

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> interpretation is consistent with the language of the statute, the cases applying it, and the legislative history.

Central Ill. Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv., 730 F.Supp. 1498, 1507 (W.D. Mo. 1990); see also *Southland Corp. v. Ashland Oil, Inc.*, 696 F.Supp. 994, 1000 (D.N.J. 1988) ("CERCLA . . . does not abrogate [private] parties' contractual [indemnity] rights."), *reconsidered in part*, 1988 WL 12855 (D.N.J. Nov. 23, 1988).

In this light, Hudson's call for a uniform federal common law for insurance covering CERCLA liabilities rests on a exaggeration of the stakes involved. Arranging for payment from an otherwise-not-responsible third party is "essentially tangential to the enforcement of CERCLA's liability provisions." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986). It concerns primarily private parties, not the United States or a unique federal interest such as military procurement. *See Boyle v. United Tech. Corp.*, 487 U.S. 500, 506-08 (1988). Nothing in CERCLA gives the explicit suggestion necessary to infer that Congress intended to rely on a body of federal common law to interpret insurance policies. *Cf. National Audubon Soc. v. Department of Water*, 869 F.2d 1196, 1201-03 (9th Cir. 1988) (reaching like conclusion regarding Clean Air Act).

While Hudson makes much of the congressional intent to make polluters pay, this emphasis is misplaced. One problem in the reasoning lies its source, S. 1480, a Senate bill that precursed CERCLA. The relevant section underwent change from the committee version. *See AM Int'l*, ___ F.Supp. at ___, 1990 WL103154, 4. The material changes render useless the earlier legislative history cited by Hudson. *See In re Burns*, 887 F.2d 1541, 1546 (11th Cir. 1989).

More importantly, the "polluters pay" goal is not jeopardized by an autonomous body of state law on insurance. "[C]ompelling insurance companies to pay will eventually impose the full cost on the insured, by means of carefully calculated and frequently revised premiums, which will in turn

cause of action. "Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 (1986). Further, § 9607(e)(1) cannot be seen as a source of a federal cause of action because "[a] law that does not 'affect' the ability of a

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encourage the insured to operate at an efficient level of accident prevention." *Developments in the Law – Toxic Waste Litigation*, *supra*, at 1578 (footnote omitted).

> In the effort to impose on waste-handling firms the full costs of the risks they generate, a regime of full insurance with premiums tailored tightly to risks is preferable to a regime of no insurance with firms bearing all liabilities. The insurance industry is expert in collecting and evaluating risk data, identifying methods of risk reduction, and charging premiums that reflect broad risk experience. Individual firms lack such expertise, and society would pay large transaction costs if each firm had to determine the proper price of every risk it incurred. In addition, large insurance pools provide for the compensation of tort victims and the funding of cleanup agencies, whereas individual firms are often overwhelmed by their waste-related liabilities. . . .

Id. at n.40 (citations omitted). The primacy of the remedial aspect of CERCLA *see United States v. Fleet Factors, Inc.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990), *petition for cert. filed*, No. 90-504 (Sept. 21, 1990), confirms the importance of giving effect to otherwise valid insurance policies. The creation of a federal rule to govern insurance policies would introduce confusion and uncertainty into commercial relations long committed to state law. *Cf. Mardan*, 804 F.2d at 1460 (rejecting suggestion to create federal rule to govern CERCLA releases).

[party] to sue hardly creates a cause of action." *Dillon v. Combs*, 895 F.2d 1175, 1177 (7th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3054 (U.S. July 2, 1990) (No. 90-25). In the absence of a federal remedy directed to the matter of insurance coverage, "the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 814.

Given that jurisdiction is not directly conferred by a cause of action concerning insurance, Hudson's "complete preemption" argument must be evaluated. This argument underlies both theories upon which jurisdiction is asserted, so its success or failure determines the Court's ability to hear this case. Because the Court finds that the reconstructed suit for which declaratory judgment is sought does not fall within an area of complete preemption, the Court concludes that jurisdiction is lacking. *Accord Boone v. DuBose*, 718 F.Supp. 479, 485-86 (M.D. La. 1988) (examining structure of CERCLA to conclude that Congress did not intend complete preemption that would give rise to "arising under" jurisdiction).

The McCarran-Ferguson Act serves as a starting point. Pursuant to 15 U.S.C. § 1012(b), state regulation of the business of insurance, which includes the determination of the substantive meaning of insurance policies, is protected from the effect of federal legislation enacted under the commerce clause unless the federal statute is expressly applied to the insurance business. *See Cochran v. Paco, Inc.*, 606 F.2d 460, 463 (5th Cir. 1979). It "precludes the application of federal laws if, as a result, laws of a state regulating insurance would be invalidated, impaired, or superseded." *Miller v. National Fidelity Life*

Ins. Co., 588 F.2d 185, 186-87 (5th Cir. 1979). In a nutshell, the McCarran-Ferguson Act creates a strong presumption against a finding of federal preemption of insurance regulation. See Comment, *supra*, 16 ECOLOGY L.Q. at 778.

This recognition of the McCarran-Ferguson Act should be coupled with a recognition that CERCLA is a broad, wide-ranging regulatory and remedial regime. Questions of liability under CERCLA are federal questions, resolved by reference to federal common law. For instance, the doctrine of corporate successor or parent liability for CERCLA response costs is one of federal common law. *See, e.g., Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1262-63 (9th Cir. 1990) (successor liability); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988) (same), *cert. denied*, 488 U.S. 1029 (1989); *United States v. Kaiser-Roth Corp.*, 624 F.Supp. 15, 19-24 (D.R.I. 1989) (parent corporation liability). Likewise, the validity of a release of the right to a CERCLA contribution action is a matter of federal law for which state law provides the rules of decision. *See Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457-60 (9th Cir. 1986). In each of these instances, however, federal law applies not because CERCLA is unique in any fashion; rather, because federal liabilities and federal rights are involved, federal law must be consulted. *See, e.g., Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (federal law determines matter of corporate liability for federal statutory obligations); *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982) (federal law determines validity of purported releases of federal statutory causes of action).

If the description of the statutory scheme halted at this point, it may appear that a potential for conflict exists. Further examination of CERCLA suggests otherwise. Section 9614(a), for instance, provides, "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." Broadly construed, this savings clause effectively rebuts any inference that CERCLA is intended to override the presumption against preemption of insurance regulation guaranteed by the McCarran-Ferguson Act., *Cf.* Comment, *supra*, 16 ECOLOGY L.Q. at 779 ("CERCLA is not an insurance statute").

Additionally, section 9651(g)(3) directed a study by the General Accounting Office to determine the insurability of hazardous waste facilities, which in part covered "[c]urrent trends, if any, in the judicial interpretation and construction of applicable insurance contracts. . . . " This statutory directive appears to presuppose the state law regime governing insurance contracts, *see, e.g.*, H. CONF. REP. NO. 962, 99th Cong. 2d Sess, 276 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3369, and the study, completed in 1987, does not belie this reading. Once more, the statute on its face rebuts Hudson's suggestion that Congress intended to vitiate the presumption of state insurance regulation embodied in the McCarran-Ferguson Act.

More direct evidence lies in subchapter IV of CERCLA, the only portion of the statute directly addressed to insurance, specifically, pollution insurance. While subchapter IV makes inroads into the state power to regulate insurance in order to authorize risk retention

groups and purchasing groups that offer pollution insurance,[6] it provides, "[n]othing in this subchapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State." 42 U.S.C. § 9672(a). Thus, entities that are formed expressly for the purpose of providing insurance to cover CERCLA liabilities can expect that the content of their insurance policies will be subject to state insurance law. It logically follows from this savings clause that CERCLA

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[6] Subchapter IV must be read in conjunction with the Liability Risk Retention Act of 1986 ("RRA") which passed contemporaneously with the relevant CERCLA amendments. See Superfund Amendments & Reauthorization Act of 1986, Pub. L. 99-499, § 210(b), as added by Liability Risk Retention Act of 1986, Pub. L. 99-563, § 11(c)(1), 100 Stat. 3177 ("For purposes of [42 U.S.C. §§ 9671-75], the powers and authorities of States addressed by the Risk Retention Act of 1986 are in addition to those of this act."). The limited purpose of the RRA was to pierce the state laws that prevented or impaired the operation of risk retention groups without preempting the myriad of other state regulations of insurance. *See Scales v. Memorial Medical Center*, 690 F.Supp. 1002, 1005-06 (M.D. Fla. 1988). Because the scope of the laws subject to preemption to accomplish the goals of the RRA could give rise to a wider preemption inference, the RRA carefully states its preservation of State authority in several places. *See* 15 U.S.C. §§ 3902(f)(1), 3903(g), 3905. Similarly, subchapter IV of CERCLA employs, of necessity, a federal law definition of pollution insurance in the course of defining the statute's reach, *see* 42 U.S.C. § 9671(2), while clarifying the limited purpose of the definition, *id.* § 9672(a). As with the RRA, it is the apparent potential for preemption that prompted congressional inclusion of a savings clause. The absence of an identical provision in subchater 1 of CERCLA then, is not an inference in favor of preemption; rather, it is indicative of Congress' belief that no preemption inference is raised by the structure of that portion of CERCLA.

does not preempt state insurance generally. Otherwise the Court must engage in the assumption that Congress intended for federal insurance law to apply to pollution insurance except when federally-protected risk retention groups are the carriers. The absurdity of this arrangement illustrates the weakness in Hudson's complete preemption argument.

The fallacy committed by Hudson is its assumption that the expansive scope of CERCLA in some respects extends to all matters somehow related to those known to be preempted. The case law regarding the complete preemption doctrine dispels this fallacy. Suits arising under § 301 of the National Labor Relations Act ("NLRA"), for example, form the fundamental body of law concerning complete preemption. Yet "not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted by § 301 or other provisions of the federal labor law." *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). "[E]ven under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section. For instance, a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been violation of an employer-union contract." *Franchise Tax. Bd.*, 463 U.S. at 25 n.28.

In fact, one case involving the NLRA, *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), is analogous to the present case. In *Malone*, the Court was presented with the argument that the NLRA preempted a right established in a state pension statute because the NLRA empowered the parties to collective bargaining agreement to come to a

private agreement about the subject of the state law. This argument parallels Hudson's assertion that CERCLA preempts state insurance law by preserving the right to enter into a contract of insurance that covers liabilities that may arise under CERCLA. The *Malone* Court, however, rejected the argument. See *id.* at 504-05; accord *Lueck*, 471 U.S. at 212 n.7. This Court perceives no distinction that spares Hudson's argument from the power of this analogy.

It is plain, then, that regardless of the degree of preemption created by a federal statute, the Court must isolate the issues in controversy to determine if those particular issues arise under federal law or not. The issue in this case, the enforceability of an insurance contract, does not fall within the preemptive scope of CERCLA. To the extent that questions of federal law will be implicated in determining Hudson's liability on the policy, those questions are solely an ingredient of a defense, not the underlying cause of action. This type of suit does not arise under CERCLA or any other federal law.

Absent federal question jurisdiction, this Court possesses no basis to entertain this suit. In accordance with the foregoing, it is

ORDERED AND ADJUDGED:

1. That defendant Green River Steel Corporation's Motion for Judgment on the Pleadings is hereby granted;

2. That this case is hereby dismissed without prejudice for want of subject matter jurisdiction; and

3. That the Clerk of the Court is hereby directed to enter final judgment dismissing this case without prejudice for want of subject matter jurisdiction.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 12th date of October 1990.

/s/ Howell W. Melton
UNITED STATES
DISTRICT JUDGE